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DRAFT REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FORTY-EIGHTH SESSION

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CHAPTER IV

STATE SUCCESSION AND ITS IMPACT ON THE NATIONALITY OF NATURAL AND LEGAL PERSONS

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A. Introduction

1. At its forty-fifth session, in 1993, the Commission decided to include in its agenda the topic entitled "State succession and its impact on the nationality of natural and legal persons". 1/ The General Assembly endorsed the Commission's decision in paragraph 7 of resolution 48/31 of 9 December 1993, on the understanding that the final form to be given to the work on the topic shall be decided after a preliminary study is presented to the Assembly. At its forty-sixth session, in 1994, the Commission appointed Mr. Václav Mikulka Special Rapporteur for the topic. 2/ In paragraph 6 of its resolution 49/51 of 9 December 1994, the General Assembly endorsed the intention of the Commission to undertake work on the topic, on the understanding, once again, that the final form to be given to the work shall be decided after a preliminary study is presented to the Assembly.

2. At its forty-seventh session, the Commission had before it the Special Rapporteur's first report (A/CN.4/467). Following its consideration of the report, the Commission established a Working Group on the topic entrusted with the mandate to identify issues arising out of the topic, categorize those issues which are closely related thereto, give guidance to the Commission as to which issues could be most profitably pursued given contemporary concerns and present the Commission with a calendar of action. 3/ The Working Group submitted a report to the Commission, containing a number of preliminary conclusions regarding the impact of State succession on the nationality of natural persons. 4/ The Commission decided, on the recommendation of the Special Rapporteur, to reconvene the Working Group at the forty-eighth session to complete its task, which will enable it to meet the request contained in paragraph 6 of General Assembly resolution 49/51. 5/

1/ Official Records of the General Assembly, Forty-eighth session, Supplement No. 10 (A/48/10), para. 440.

2/ Ibid., Forty-ninth session, Supplement No. 10 (A/49/10), para. 383.

3/ Ibid., Fiftieth session, Supplement No. 10 (A/50/10), para. 147. For the composition of the Working Group, see para. ... above.

4/ Ibid., Annex.

5/ Ibid., para. 229.

B. Consideration of the topic at the present session

1. Consideration of the second report of the Special Rapporteur

3. At the present session, the Commission had before it the Special Rapporteur's second report (A/CN.4/474), which it considered at its 2435th, 2451st and ... meetings, held on 4 June, 2 and .. July 1996.

4. The Special Rapporteur observed that the purpose of the report was to enable the Commission to complete the preliminary study of the topic and thus comply with the request of the General Assembly. The report was, in particular, designed to facilitate the task of the Working Group on the topic in its preliminary consideration, at the present session, of the questions of the nationality of legal persons, the choices open to the Commission when it would embark on the substantive study of the topic, and a possible timetable.

5. The Special Rapporteur had thought it useful to present a broad picture of State practice, from the nineteenth century to the recent past, in all regions of the world, and regarding different types of territorial changes. He had refrained from analysing such practice, believing that this exercise would form part of the substantive study the Commission would undertake if invited to do so by the General Assembly.

6. The report was divided into an introduction (Chap. I) and three substantive sections. Chapter II dealt with the nationality of natural persons, and attempted to summarize the results of the work already undertaken on that aspect of the topic, to classify the problems in broad categories and to suggest material for analysis at a later stage of the Commission's work. The Special Rapporteur stressed the importance he attached to the views expressed in the Sixth Committee on each of the following specific issues discussed in that Chapter: the obligation to negotiate in order to resolve by agreement problems of nationality resulting from State succession; the granting of the nationality of the successor State; the withdrawal or loss of the nationality of the predecessor State; the right of option; the criteria used for determining the relevant categories of persons for the purpose of granting or withdrawing nationality or for recognizing the right of option; non-discrimination; and the consequences of non-compliance by States with the principles applicable to the withdrawal or the granting of nationality.

7. The Special Rapporteur expressed the view that, as far as the problem of nationality of natural persons was concerned, it could generally be inferred that his first report, the preliminary report of the Working Group and

the debates in the Commission and the Sixth Committee provided all the elements necessary to complete a preliminary study of that aspect of the topic.

8. That was not yet the case with the other aspect, i.e. the nationality of legal persons, which was addressed in Chapter III, and which should be the main focus of the Working Group at the present session. The Special Rapporteur had attempted to outline the scope and characteristics of the subject and to bring out its many and considerable complexities, including the various forms that legal persons could take. He observed that, apart from State succession, the problem of the nationality of legal persons arose mainly in the areas of conflicts of laws, the law on aliens and diplomatic protection as well as in relation to State responsibility.

9. The Special Rapporteur pointed out that views had been divided both in the Commission and in the Sixth Committee as to whether a more in-depth consideration of this aspect should be undertaken at the present stage. He himself had expressed, at the previous session of the Commission, his preference for putting that issue aside and for focusing on the nationality of natural persons, but as the Commission had requested more information for the debate, he had felt compelled to respond accordingly.

10. In Chapter IV, containing recommendations concerning future work on the topic, the Special Rapporteur suggested again to divide the subject into two parts, focusing first on the nationality of natural persons. He also recommended that the Commission leave the question of the rule of the continuity of nationality for further consideration in the framework of the topic of diplomatic protection, should the latter be included in the Commission's agenda. As to the working methods, the Special Rapporteur had nothing to add to what he had already said in his first report with regard to the adoption of an approach involving both codification and progressive development of international law, the terminology used, the categories of State succession and the scope of the problem. The Working Group could review those elements and make relevant proposals to the plenary.

11. As to the form which the outcome of the work might take, the Special Rapporteur indicated his preference for elaborating a declaratory instrument consisting of articles accompanied by commentaries. If the Commission agreed with that approach, it might be able to complete its first reading of all the articles and the commentaries in the course of the next session, an option which could also be discussed in the Working Group.